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ON THE STATUTE OF WILLS—ITS REAL SIGNIFICANCE AND ITS CONTINUED PERVERSION BY COURTS.

This paper does not contemplate a presentation of existing doctrines of the law in the field of interpretation. Such a task were well-nigh impossible. The state of the law within this domain can only be characterized as chaotic. It would be an easy matter to bolster up every conceivable theory of interpretation, however contradictory, by reference to decided cases. There has been unfortunately no consequent, harmonious, logical theory adopted by the courts in interpreting instruments brought before them for construction. The consequence has been practically the rejection of legal principles and the ignoring of legislative enactments in an endeavor by the judiciary to decide each case according to its inherent merits. If there is no science of law, if the immediate aim of the law is to mete out to every man his desserts according to the dictates of conscience—the free and uncontrolled conscience of the particular judge before whom any case be brought—then the books reveal within this field a decided tendency toward the realization of the legal ideal. If, on the contrary, and it is this that I assume to be true, the law is in reality of a scientific nature, viewing the particular in the light of the general, applying principles to facts, then it becomes evident that the existing method of interpretation is defective and should be remedied.

I shall confine myself in this paper to the subject of wills, not that wills are on principle different from other written instruments in regard to interpretation, but merely because it is concrete; all deductions affecting this subject apply with equal validity to all instruments required by law to be in writing. It is rather remarkable that there should exist such confusion in the law of interpretation of wills. The existence of a Statute of Wills, by virtue of which a will must, to be legally a will, be in writing, affords all the material requisite

for the formulation of a consistent, logical theory of interpretation, and, it is submitted, the confusion that exists is the result of a perversion of the provisions of such statutes.

A Statute of Wills is enacted as a matter of policy. Owing to the ease with which a testator's intended disposition of property might be thwarted, either by fraud or mistake, if it were required of the court to glean from evidence what intent was actually present in the mind of a decedent, the legislature has established the rule of law that an individual may control the posthumous distribution of his property only by means of a written instrument. The legislature, recognizing the impracticability of a quasi-psychological investigation by a court of law, has effected a provision whereby an objective is substituted for a subjective field of inquiry. The legal will, a written instrument, objective and concrete, becomes the determinant of distribution in the place of the subjective will, the volition, the intent of the testator. In enacting a measure requiring wills to be in writing the legislature has said to prospective decedents: "When you die your property will be distributed according to the intestate laws unless you command otherwise in a written order; if you do, then your property will be distributed according as you thus command, subject, of course, to existing rules of law."

If this conception be true then the entire duty devolving upon a court, when a will is brought before it for execution, is to determine what the content of the will is and to execute it. The court is concerned only with the legal meaning of the terms used therein and their being carried into effect according to that meaning. The legal meaning of any term is that connotation which is by law accorded to such term. It is true that the law ordinarily adopts the popular or dictionary significance of words, and the legal and common meanings coincide, but this adoption is not uniform. According to the popular meaning of the word child, the offspring of a man and woman is the child of such man and woman; in the law such offspring is not regarded as a child of those who called it into being, unless they are legally married. If a woman goes through the ceremony of marriage with a single man she

would be described in the vernacular as that man's wife, regardless of the fact that the man was the widower of the woman's sister. In an English court, however, such woman would be merely the man's mistress. The mere statement that there is a difference between the legal and popular significance of a term reveals the necessity of the adoption by courts of the former. Were the latter to be adopted in any instance then the very fact that the court does adopt that meaning would destroy the distinction, and the legal meaning would be merely one of several permissible meanings.

In thus outlining the nature of a will as an instrument for judicial interpretation, I have entirely ignored the consideration of the testator's intention. That intention, it is submitted, should be a matter of no concern whatever to the court. There is no doubt that the object of the legislative mandate that wills be in writing was the effectuation of a means whereby the intention of prospective testators might best be executed. Certain it is that the legislature in enacting a measure, by virtue of which a decedent's property will be distributed according to his written command, presumed that such command would express the intention of the decedent. But the presumption that the command which will be executed contains in its provisions that which the testator intended to be executed is a *legislative and not a judicial presumption*. It concerned the legislature in that it was the motive for the establishment of the hard and fast rule that what a testator orders in writing to be done shall be done, and that only. It does not, or at least should not, concern the court, because the court is bound by the legislative act whatever be its origin or however well it accomplishes the purpose for which it was framed. It is true that the legislature devised, wisely or unwisely, a means for the safer execution of testators' intentions, but it is also true that the means thus devised was the substitution of the testator's written command in the place of a subtle and impracticable inquiry into his specific intention.

The distinction between what I have designated as a legislative and a judicial presumption has not been recognized by the courts, and the reported cases teem with expressions to

the effect that a testator is presumed to have intended what he said, and that the ultimate question to be answered by a court in examining a will is, "what was the testator's intention?" It has been this attitude that has caused such hopeless confusion in this department of jurisprudence and annulled, to a very considerable extent, the enactment requiring wills to be in writing.

It is apparent from the short sketch above that this paper holds that the question of intention should not be a matter before the court at all, the legislature having established a rule of law, by virtue of which the function which would otherwise belong to intention is exercised by the objective written instrument. The opposite view is commonly held, however,—a view which, it is submitted, carries its refutation upon its face, and which is productive of that very mischief which the Statute of Wills is calculated to avoid and would avoid were it not interpreted out of existence by what I might characterize as this theory of intention. Perhaps the ablest exposition of this theory is contained in an article by Mr. Hawkins¹ and his thoughts can be best presented in his own words. He says: "The legal act, so to speak, is made up of two elements—an internal and an external one; it originates in intention and is perfected by expression. Intention is the fundamental and necessary basis of the legal effect of the writing; expression is the outward formality annexed by the law. . . . The language or written expression is therefore valuable in a two-fold sense. Towards the collecting of the intent it is, as before, valuable as a mark or a sign, though not necessarily the only or even chief mark or sign, but it may be one among many; it is, secondly, valuable in and by itself as a condition of legal validity, essential to give effect to the intention. To interpret a legal writing is, therefore, first to collect the intent, to discover the writer's meaning; secondly, to ascertain that that meaning is expressed sufficiently."²

¹ On the Principles of Legal Interpretation With Reference Especially to the Interpretation of Wills. By F. V. Hawkins, Esq., 2 Jur. Soc. Papers, 298.

² 302.

It must be borne in mind that Mr. Hawkins is not endeavoring to present a resumé of judicial opinions, but logically to deduce a congruous theory of interpretation, based upon the Statute of Wills. The first question which suggests itself, therefore, concerns the origin of the position that "intention is the fundamental and necessary basis of the legal effect of the writing." Does the statute even advert to intention? Is there anything therein rendering it necessary for the court to establish, as a fundament upon which to base the execution of a testator's writing, an intention in the testator's mind? There is no doubt that a legislative desire to devise a means best calculated to effectuate testators' intentions is "the fundamental and necessary basis" of the Statute of Wills, but it is also true that, by virtue of the Statute of Wills, intention is no longer a subject of judicial inquiry. There is no doubt, as I have said before, that the legislature, in requiring that testamentary commands be executed by courts of law, presumed that such commands would express that which he who commanded intended, but it is also true that, whatever the purpose of the legislative requirement, its provisions are binding upon the courts whether such purpose be well or poorly realized.

But, to continue with Mr. Hawkins' exposition, let us consider his conclusion quoted above, "to interpret a legal writing is, therefore, first, to collect the intent, to discover the writer's meaning; secondly, to ascertain that that meaning is expressed sufficiently." According to this conception there are two separate requisites for a valid devise or bequest, first, a specific intent to dispose of the property in a certain way, and this intent as such will be executed by the court; and secondly, an adequate expression of such intent. The intent is the substance, the words the form. The words, that is to say, the written characters of definite significance, are, in themselves, of no import whatever; it is only in so far as they give form to, or express something essentially different therefrom, *i. e.*, the testator's intent, that they become of any value at all. Since, however, a will, as paper before a court, is only an aggregate of words. it is clear that, according to this theory, it cannot be

executed simply according to its terms, however clear those terms may be. If it were executed without further ado, according to the clear meaning of its terms, the testator's intent, that "fundamental and necessary basis of the legal effect of the writing," would thereby be ignored, and there would exist the anomalous judicial phenomenon of a writing being accorded legal effect in the absence of the *sine quâ non* for its validity.

To avoid this contradiction either one of two positions might be assumed by those who defend the intention theory. On the one hand, it might be admitted that what is said above obtains, and, therefore, a court should, as its first duty, institute an inquiry into the intent of the testator, ascertain that definitely, and then decide whether or not that intent is adequately expressed. The meaning of the testator's words may be absolutely clear and capable of execution, but that execution shall not be decreed until its "fundamental and necessary basis"—the testator's actual intent—has been established. Then, if the words of the will are found to be a sufficient expression of such intent, it shall be given effect. It is not surprising that this position has never been even considered by the courts. If it be a proper one what can be the possible object of the Statute of Wills? If the testator's specific intent is still the subject of inquiry and of execution, then the sole and only function of the Statute of Wills is to invalidate testamentary intentions unless they are embellished with an absolutely purposeless string of red tape. All the possibilities of fraud and mistake attendant upon the quasi-psychological inquiry into intent are left intact, and a further means of defeating such intent is devised.

The other of the two refuting positions has, however, found great favor among judges and writers. Its foundation is a fiction, which, like all fictions, pretends to do one thing while actually doing that which is opposed thereto, and in this particular field the fiction itself, instead of the real principle of law, becomes the basis upon which rules of interpretation are constructed and, necessarily, falsely constructed. The position may be best presented by again referring

to Mr. Hawkins' article. He says: "Supposing, therefore, language to be a perfect code of signals . . . , it would be correct to say that the object of inquiry in the interpretation of a legal writing was answered by ascertaining merely the meaning of the words; not because the meaning of the words was the ultimate or real object of inquiry, but because the meaning of the writer, which is the real object, would be thereby ascertained to so high a degree of probability that expediency would not allow it to be questioned by the admission of further evidence, or the inquiry after intention to be prosecuted further. It would not be true to say . . . that the question was, not what the writer meant but what was the meaning of his words; it would be true to say that the meaning of his words was so strong a proof of what the writer meant, that the two must conclusively be taken as identical."¹

To paraphrase Mr. Hawkins' ingeniously arranged argument, he asserts that when there exist in a will words clear in meaning and capable of execution those words will be executed without further inquiry according to their clear meaning, not because the court is bound by what the testator has said, regardless of his intention, but because what he has said expresses his intention. And how is it known that the words express his intention? The law says so. But what if it can be proven that the words express something opposed to his intention? That is impossible, for the law will not allow it to be proven. Whatever the intention of the testator living, the intention of the testator dead corresponds to the meaning of his words. There is a conclusive presumption of law to that effect and conclusive presumptions cannot be overthrown.

If the expression "testator's intention" means anything at all it means the idea which was present in the testator's mind, and that idea is a fixed, determined fact of the past, and all the judicial decrees that have ever been uttered, and all the fine-spun arguments that have ever been contrived, cannot change it one iota. The testator's intention is that which the testator intended, and not that which any judge conclusively presumes he intended. A conclusive presumption is always a fiction

¹305, 306.

invented by courts as a means to override a rule of law which they pretend to follow. When, therefore, Mr. Hawkins in his theoretical discussion introduces a conclusive presumption he is unwarrantedly clouding the real issue. The question is not "what pretense should courts make in interpreting wills and the Statute of Wills" but rather "what principle of interpretation should the courts adopt?" If, as a matter of real fact, the clear meaning of the words in a will is at variance with the testator's intention and the court executes such clear meaning regardless of the intention, the court is simply concerning itself with that to which Mr. Hawkins objects, viz., "not what the writer meant but what is the meaning of his words." Whatever be the fiction resorted to by way of apology the fact remains that the court, in adjudicating upon a will, the terms of which are clear in meaning and capable of execution, must always adopt the objective standard and execute the words without regard to the subjective considerations which may have impelled the testator to frame them. I say that the court must do so, because if it were to proceed according to the first of the two positions just discussed, it would be compelled, as I have endeavored to show above, to construe the Statute of Wills as an absurdity worse than purposeless. There is, it is submitted, no other than these two possible positions that can be urged in support of the contention that the duty of a court in construing a will is to arrive at the testator's intention instead of holding itself bound by the testator's words considered in an objective light. The first of these positions is untenable because it would overthrow a legislative enactment which is binding upon courts; the second is impossible because it only pretends to proceed on the principle which it defends, whereas, in reality, it proceeds on the very principle which it pretends to reject.

The original conclusion as to the significance of the Statute of Wills, deduced from the phraseology and motive of the statute itself and strengthened by the inadequacy of opposed conceptions, appears, therefore, to contain the only possible logical principle of interpretation, to wit, that, by virtue of the Statute of Wills, a court is bound to regard a will solely in its

objective light, that is, as an aggregate of words whose significance conveys a command, which command, if capable of execution, must be executed. The question of the testator's intention is of no concern whatever to the court.

We have thus far used, for purposes of illustration, a perfect will, that is, one whose terms are of clear and definite meaning and capable of being carried into effect. When a perfect will is laid before a court it is practically certain¹ that even in the existing confused state of the law, its provisions will be executed, though the court will base its proper conduct upon the totally unnecessary fiction of a conclusively presumed correspondence of intent and expression. But wills are not always perfectly drawn. They frequently contain inaccuracies or insufficiencies, commonly called ambiguities. A written provision in a will may be incapable of execution unless supplemented by the testator's intent, whether that intent be arrived at indirectly by judicial conjecture from the circumstances of the testator, the beneficiary and the property, or whether it be gleaned directly by evidence bearing immediately thereon. It is in cases of ambiguous wills that the question as to the real significance of the Statute of Wills ceases to be merely academic and becomes determiningly practical.

The Statute of Wills is general in its bearing. It affects wills as a class, and the principles of law which it contains apply to every will.² It would be folly to contend that the statute should apply only to wills in which the writing which it enjoins has been properly done, but should be suspended, in part or in whole, in cases where there has been a faulty compliance with its requirements. Such a position would amount to a complete overthrow of the legislative act, in that it would respect it only when its application would be of no effect whatever, and would reject it whenever its application would be

¹ But see *Tucker v. Seamen's Aid Soc.*, 7 Met. 188, where indirect evidence of intent was admitted to overthrow a perfect provision in a will, the court held, however, that the evidence was not sufficient.

² I shall ignore altogether the one legally tolerated exception, nuncupative wills, as they do not affect nor are they affected by the subject of this discussion.

effectual. The principle of interpretation contained within the statute must be of universal bearing, and all wills must stand or fall according as they conform to, or depart from, it. That principle has been found to be a corollary to the provision of the statute that wills must be in writing, and is to the effect that courts must execute the written commands of testators and only the written commands. *If the words of the will contain a command capable of execution, the court is required by legislative mandate to execute it ; if they do not contain a command, there is nothing for the court to execute ; if they contain a command incapable of execution it, is impossible for the court to execute it ; if they contain a command to do either of two things, that is, a command capable of execution in either of two ways, the court, having no right of choice may not execute it at all, for testators only, and not judges, may dispose of property by will.*

The four enumerated possibilities are practically exhaustive, and the duty of the court in each case must, if the principle for which I contend be true, be as indicated. I must confess that it is with great timidity that I presume to advance the revolutionary idea that ambiguous testamentary provisions are void, and it is only because I feel convinced of the irresistible truth of the premises that I dare draw the logical result therefrom. If it be true that the statute requiring wills to be in writing substitutes an objective determinant of distribution—the written instrument—for a subjective—the testator's intent—and banishes the latter from the field of judicial inquiry, then it must follow, as the night the day, that evidence of intent can never be admissible. It is only on the principle that the real subject of inquiry and of execution by a court adjudicating upon a will, is the testator's intent that evidence thereof can be admitted to affect ambiguities within the will. Courts have always recognized that fact, and have expressly based the admissibility of such evidence upon that theory. But we have found that courts do not and, in the face of the statute, cannot consistently administer such a theory. We have seen that, in the absence of ambiguities, the court must either reject the statute or execute the testator's will solely according to its written provisions, regardless of the testator's intent—that

which in the case of an ambiguous instrument is declared to be the real subject of execution. But the Statute of Wills cannot be limited in its operation to unambiguous wills. It is because of its universal application that courts were compelled, in admitting evidence of intent in cases of ambiguous wills, to invent the fiction of conclusive presumptions. Having applied the intention theory to ambiguous instruments they pretended to generalize it. But the intention theory is a flat overthrowing of the statute, and this fact is revealed the moment it is applied to unambiguous wills. The courts, therefore, could not apply it in such cases, so they were compelled to do the next best, or rather the next worst, thing and pretend they were applying it, whereas, in reality, they were rejecting it. The pretended principle, though diametrically opposed to the actual principle, was formulated as the rule of law and applied to ambiguous instruments, so that the statute, though still in force in the case of unambiguous wills, has been continually over-ridden in the case of ambiguous wills.

That this has been the actual course of the law on the subject is manifest from the cases, and Mr. Hawkins most naively adopts the entire fallacy and advances it in all its nakedness as a real argument in support of the intention theory. He says: "For what is it that gives rise to all questions of interpretation? Is it not that the meaning of the words fails to express the meaning of the writer? The meaning of the words, their known and definite signification, is ascertained; it proves to be not plain, not intelligible, not appropriate to surrounding facts and circumstances. What is the result? Manifestly, the presumption that the meaning of the words was the meaning of the writer is rebutted; it becomes necessary to seek further for that meaning."¹ "It is only through the fact and to the extent that there exists a discordance between the language and the intent, between the meaning of the words and the meaning of the writer, that the former become subject to alteration; when the language has been interpreted so that the meaning is clear, the presumption

¹ 306.

that that meaning must be the writer's meaning returns in full force, and the office of interpretation is at an end.'"¹

Mr. Hawkins, therefore, argues that interpretation has its origin in the fact that there is a dissonance between the words of the will and the intent of the testator, and in the next sentence explains that he means by this, not what he says, but that the words of the will, objectively considered and regardless of intent, are incapable of execution. If they could be executed there would be no need of interpretation, whether the words expressed the testator's intent or not. But if his position be thus candidly expressed, the falsity of his inference therefrom would be evident. The error is, therefore, introduced into the premise where it can be tolerably well hidden under a lot of wordy rubbish, and disappearing and returning presumptions are made to exercise this questionable function. In logical terms the procedure of Mr. Hawkins and of the courts in deducing a theory for interpreting ambiguous wills is as follows :

Unambiguous wills are, and under the statute must be, executed according to the commands they contain, objectively considered and regardless of questions of intent, but let us suppose or presume that

All wills are, and must be executed according to the intent of the testator ; therefore, since

Ambiguous wills are wills

Ambiguous wills must be executed according to the intent of the testator,—

a conclusion which falls as soon as the falsity of the major premise is revealed. There can be but one syllogism, it is submitted, true in its premises and conclusion, and covering the question at issue, and such a syllogism is merely a reduction into logical form of the provisions of the Statute of Wills. The statute provides that nothing shall be executed as a will that is not a written command, and since an ambiguous provision is not a written command, capable of execution, it follows that an ambiguous provision should not be executed.

¹ 311, 312.

What actually happens every time an ambiguous clause is executed? Does not the court, in every instance, ignore the binding legislative mandate that only written testamentary provisions shall be effectual? When an ambiguous clause is "explained" (to use the misleading term often applied) the court does not execute a written testamentary provision, but the unwritten intent of the testator, and the execution of the testator's intent, as such, is, by the statute, beyond the proper province of the court. That it is specifically the *unwritten* intent that is executed is apparent from the fact that the court cannot execute that which is written, and is, therefore, compelled to look further and learn the actual intent, whereas, were it the written intent that the court executes, what necessity would there be for searching beyond the writing itself? The ascertained intent either does or does not add to the writing. If the latter, then there is no reason why the intent should be ascertained, or, in other words, there is no ambiguity; if the former, then the proceeding is an illegal usurpation of power by the court, for the statute definitely provides that it is *only* by means of *written* provisions that an individual may control the posthumous distribution of his property. If the testator is allowed to control such distribution by means of an intent not contained within the writing, the statute is violated. The written provision becomes merely *evidence* of the testator's intent; the court would, however, be compelled to treat such a written statement by the testator as evidence of his intent, even though the Statute of Wills had never been enacted. The statute thus becomes a dead letter in so far as ambiguous wills are concerned, and might as well never have been passed.

Let us observe a few typical cases, the facts of which are of such a nature as to make the admissibility of evidence of intention appeal most strongly to one's sense of justice. The case of *Patch v. White*¹ was decided by the highest tribunal in this country and a divided court affirmed the opinion of the lower court. This was an action in ejectment, the plaintiff claiming

¹ 117 U. S. 210.

under Henry Walker, devisee of James Walker. James Walker died seised of various tracts of land, including a tract in Washington City, known on the plats and ground plan of the city as Lot No. 3, Square 406. In his will he devised to Henry Walker "lot numbered six in square 403, together with the improvements thereon erected, and appurtenances thereunto belonging." The testator did not own the lot described. Judgment was given for the plaintiff, the court holding that Lot No. 3, Square 406, the tract in controversy, passed to Henry Walker by virtue of James Walker's will. This is an exceptionally apt case for our inquiry. There is no possible doubt that the testator fully intended to devise in writing Lot No. 3, Square 406, to Henry Walker. The court truly says, "It is clear from the will itself—

" 1. The testator intended to dispose of all his estate.

" 2. That he believed he had disposed of it all in the clauses prior to the residuary clause.

" 3. That when he gave to his brother Henry Lot No. 6 in Square 403, he believed he was giving him one of his own lots.

" 4. That he intended to give a lot with improvements thereon erected."

"In view of all this and placing ourselves in the situation of the testator, can we entertain the slightest doubt that he made an error of description, so far as the numbers in question are concerned, when he wrote or dictated the clause under consideration? What he meant to devise was a lot that he owned; a lot with improvements on it; a lot that he did not specifically devise to any other of his devisees."

The argument adduced by the court is unanswerable, and the conclusion drawn therefrom unavoidable. The court has presented the facts of the case in a way which leaves no room for doubting that the testator "meant to devise a lot that he owned." But is that fact sufficient to invest the intended devisee with the title? The statute recites that devises to be effectual must be in writing; is there in this case any devise in writing of the tract which the court held was legally devised? The only written devise is of Lot No. 6, Square 403. The testator owned no such property, therefore the provision

could not be executed. The written devise is void. On further inquiry, however, the court learns of an intention of the testator to devise Lot No. 3, Square 406. It is an absolute and indisputable fact that this intention is not reduced to writing. By what warrant, therefore, does the court execute it? In carrying such an intention into effect the court is executing an unwritten will; it is thereby overriding the Statute of Wills and doing an illegal act. The case of *Patch v. White* is characteristic and illustrates the miscarriage of legal principles within this sphere.

The English case of *Leigh v. Byron*¹ also affords a striking instance of the perversion of a rule of law, in order, as in *Patch v. White*, to deal with the facts according as they impress the court's abstract sense of right. Here a testator bequeathed a legacy "to the children of my late nephew John Leigh." John Leigh, who was dead at the time the will was made, had one legitimate child and also one illegitimate child. The testator had treated them with the same regard and had spoken of them as John Leigh's children. The court awarded the legacy to both, thereby including the illegitimate under the designation of children. As in the preceding case there can be no doubt of the testator's intention to dispose of his property in the manner decreed by the court, and there is also no doubt that he failed to reduce that intention to writing. According to the terms of the will the property in question passed to a class, viz., the children of John Leigh. There was but one of that class, and, therefore, that one was alone entitled. The fact that the plural form was used in the will is of no effect, for that is the usual way of designating a class. But let us suppose, to make the case stronger still, that John Leigh had died leaving no lawful issue but two illegitimates. Even under these facts the provision of the will would be incapable of execution. The bequest is to children, and, according to our supposition, John Leigh had no children. In the eyes of the law his illegitimate progeny are not his children any more than his grandparents are his children.

¹ 1 S. & G. 486.

The word children has before the court one, and only one, meaning, viz., offspring conceived or born in lawful wedlock, and illegitimates are not embraced by that definition. From the very use of the word children, however, and from extraneous circumstances it is apparent that the testator, under the facts of the supposititious case, intended to bequeath the legacy not to John Leigh's children, but to John Leigh's illegitimates. That intention was never reduced to writing; therefore, by virtue of the Statute of Wills, it cannot be executed.

The position assumed in *Leigh v. Byron*¹ has been followed almost universally. There is also a rule of law, or, at least, judges continually assert that there is a rule of law, in England as in this country, that illegitimates and legitimates cannot take together under a general clause; there results, therefore, this rather remarkable consequence: where there is a devise to the children of X, who is dead, and X has no children or one child, and one or more illegitimates, the latter will take, if it be proven that the testator so intended. But if X has died leaving more than one child and one or more illegitimates, the illegitimates are excluded, though the testator's intention and his relation to X's family are precisely the same as in the former case. The origin of this inequitable distinction is clear and in it is revealed the fallacy upon which the admissibility of evidence of intention rests. In the latter case there exists a written clause in a will, which clause is capable of execution. The bequest is to children and there are children in existence; the clause must, therefore, by virtue of the statute, be executed as a written command, regardless of the testator's intention. In the former case the written command cannot be executed, therefore the court ascertains the testator's intention and executes it as his will, though it has not been reduced to writing. In other words, the courts interpret the legislative enactment, providing that all wills must be in writing, as meaning that a written will shall be executed whenever such execution is pos-

¹ *Leigh v. Byron* follows the earlier leading case of *Gill v. Shelley*, 2 R. & M. 336 (1831), but the former serves better as an illustration of the point under discussion.

sible; when the execution of a written will is impossible an unwritten will, capable of execution, shall be substituted for it.

There is one type of ambiguity which, though strictly speaking the only real ambiguity, is not of frequent occurrence. I can recall no actual case presenting badly the point in mind, though courts have frequently constructed supposititious cases by way of illustrating rules under discussion. We can conceive of a testator bequeathing property to "my nephew," he having more than one nephew, or to "my nephew John," he having more than one nephew John, or to "my nephew John Smith," he having more than one nephew John Smith.¹ Such provisions contain a double meaning and constitute, therefore, real ambiguities. It is manifestly impossible for a court to execute that which the testator has written, not because circumstances extraneous to the will itself prevent, but because the provision contains no command for the court to execute. The testator has merely mentioned a class, one member of which is to be the beneficiary of the legacy, but which particular member he has not specified. He has failed to dispose in writing of the legacy in question. It is true, that he has limited its possible disposition to one of a few, but that is quite another matter from disposing of it. In order to execute the clause the court would be compelled to add to the written provision the testator's intention, thereby creating a command which the will itself does not contain. The terms used being limited to an unspecified individual within a specified class are alternative in their character. They convey no more than would the phrase "to one of my nephews," or "to one of those of my nephews who are named John," or "to one of those of my nephews who are named John Smith." A devise or bequest couched in such language is, to use the conventional expression, void

¹ Not only have courts held bequests of this kind to be good, admitting evidence of intention, but they have even gone to such a length as to admit evidence to prove that a nephew, there being but one answering the description, was not meant at all, but in one case a wife's nephew of the same name, *Grant v. Grant*, L. R. 5 C. P. 727, and in another case, the illegitimate son of the testator's brother, *In re Ashton*, L. R. (1892), Probate, 83.

for uncertainty ; more strictly speaking, it is void because it is no devise or bequest at all.

I do not deem it necessary to multiply specific instances of ambiguous wills. I have chosen those above merely to illustrate what I conceive to be the miscarriage of legal principles. As I have already said, the question is of more than academic importance. It involves the application or rejection by courts of the Statute of Wills. I have contended that whenever a court "explains" an ambiguity in a will by admitting evidence of the testator's intention, and having ascertained that intention, executes it, it departs from the principle which it applies in cases of unambiguous instruments, to wit, that the testator's written words, and not his intention, are his will and must be executed as such ; it lends validity to an unwritten testamentary intention by executing it, notwithstanding the legislative provision ascribing validity to written wills only ; it, therefore, ignores a statute which it is by law compelled to respect. If this position be true, then the vast host of judicial decisions upholding the execution of testamentary intentions as such does not represent the law, and it would be the duty of a court to-day to deny the authority of reported cases and to apply the statute. It is of the nature of our system of jurisprudence that the legislature is the supreme law-making body. Its enactments, if constitutional, represent the law of the land, and the function of the judiciary is to administer the law of the land. A constitutional statute is above judicial control ; volumes of decisions and countless dicta cannot impair its binding force. The judiciary, though it try consistently for centuries, cannot repeal a legislative act. If the reported cases within this domain reveal a doctrine opposed to the provisions of the Statute of Wills, those cases should be overruled ; the statute cannot be.

The question which we have been discussing is not one of strict or liberal construction. It is folly to designate as liberal a construction which defeats the provisions of a statute or as strict an interpretation which respects them. Nor is it a question of policy. It may or it may not be wise to require an individual desiring to posthumously dispose of his property

to do so in writing, and to declare invalid any intended disposition not in writing. That question of expediency has been definitely answered by the legislature, probably most judiciously, and until the legislature sees fit to change the rule it has formulated, the courts are bound in law to respect and follow it, whatever supposed injustice may result in cases where ignorance or carelessness leads to a fatal error.

Harry E. Kohn.

Philadelphia, August 17, 1898.